Supreme Court, U. S.
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No. 97-1410

In The

Supreme Court of the United States

October Term, 1997

MERLIN E. CARLSON, JR.,

Petitioner,

v.

GENERAL ELECTRIC COMPANY, a foreign corporation, KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. REPLY TO STATEMENT OF CASE 1

III. REPLY TO OPPOSITION ARGUMENTS 2

A. A New Trial Motion Under Rule 50(b) Does Not Automatically Attach To A Motion For Judgment Notwithstanding The Verdict 2

B. The *Erie* Doctrine Has Not Been Addressed In Reference To *Daubert*, 509 U.S. 579 4

C. GE's Circular Argument Does Not Address The Conflict Over *Daubert*, 509 U.S. 579 Application 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 3

Ambroosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) 7

Chicago & North Western Railway Co. v. Britten, 301 F.2d 400 (8th Cir. 1962) 2

Daubert v. Merrell-Dow, 509 U.S. 579, 113 S.Ct. 2786 (1993) ..... *passim*

Daubert v. Merrell-Dow, 43 F.3d 1311 (9th Cir. 1995) 6

Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) 7

Eaton v. Nat'l Steel Production Co., 624 F.2d 863 (9th Cir. 1980) 2

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 5

Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) 5, 6

Hanna v. Plummer, 380 U.S. 460 (1964) 5

Hopkins v. Dow Corning Corp., 33 F.3d 116 (9th Cir. 1994) 7

Jackson v. Wilson Trucking Co., 243 F.2d 212 (D.C. Cir. 1957) 2

Joiner v. General Elec. Co., ___ U.S. ___, 118 S.Ct. 512 (1997) 4

Lust v. Merrell Dow Pharms., Inc., 89 F.2d 594 (9th Cir. 1989) 7

Marbled Murrelet v. Babbit, 83 F.3d 1060 (9th Cir. 1996) 6

TABLE OF AUTHORITIES – Continued

Page

Peterman v. Chicago, Rock Island & Pacific R.R. Co., 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974) 2

Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886) 2

Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986) 5

Schudel v. General Elec. Co., 120 F.3d 991 (9th Cir. 1997) 4, 5, 6, 7, 8

Stradley v. Cortez, 518 F.2d 488 (3rd Cir. 1975) 2

Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) 6

Tsai v. Rosenthal, 297 F.2d 614 (8th Cir. 1961) 2

COURT RULES, STATUTES, REGULATIONS

Federal Rule of Civil Procedure 1 10

Federal Rule of Civil Procedure 49(a) ..... *passim*

Federal Rule of Civil Procedure 50 ..... 1, 4, 8, 9

Federal Rule of Civil Procedure 50(b) 1, 2, 3, 4

Federal Rule of Civil Procedure 50(c) 2

Federal Rule of Civil Procedure 59 ..... 1, 2

Federal Rule of Civil Procedure 59(b) 3

Federal Rule of Civil Procedure 59(d) ..... *passim*

Fed. R. Evid. Rule 702 ..... 5, 6

20 U.S.C. §2072(b) 4

29 U.S.C. §1910.1000 ..... 1, 9

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. §1910.1499 1

Wash. Admin. Code 296-20-220 1

Wash. Admin. Code 296-62-07515 1

I. INTRODUCTION

In the Ninth Circuit Court of Appeals General Electric Company and Kaiser Aluminum and Chemical Corporation (herein collectively "GE") avoided Merlin Carlson, Jr.'s (herein "Carlson") jurisdictional challenge to the district court's authority. Until the Brief in Opposition[1], GE failed to acknowledge the matters Carlson raised concerning Federal Rules for Civil Procedure (herein "Rule") 49(a), 50(b) and 59(d).

In other cases involving GE and in the appeal below GE has approached differently matters in reference to *Daubert v. Merrell-Dow,* 509 U.S. 579, 113 S.Ct. 2786 (1993). In opposing Carlson, GE raises new positions to steer this Court away from consideration of the issues surrounding Rules 49(a), 50 and 59. GE attributes arguments to Carlson that he neither makes nor advocates.

II. REPLY TO STATEMENT OF CASE

GE compresses the margins of this record. Carlson observes the chemicals involved are closely regulated by federal and state governments. These chemicals are recognized by governments to be exceedingly dangerous to humans. See, e.g., 29 U.S.C. § 1910.1000 *et seq.;* 29 U.S.C. § 1910.1499; and Wash. Admin. Code 296-62-07515.

GE scoffs at Dr. Lantsberger's opinion on "whole body aggravation". These chemicals effect the entire body. In Washington physicians who treat injured workers, are expected to understand the concept of "total body impairment." See Wash. Admin. Code 296-20-220.

Despite GE, Carlson's record amply and specifically supports every facet of his claim and legal positions.

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[1] GE's Brief in Opposition will be referred to as "Br. Opp.". Reference to the appendix will be to those submitted by Carlson in Volumes I and Volume II. References will be "A-#".

III. REPLY TO OPPOSITION ARGUMENTS

A. A New Trial Motion Under Rule 50(b) Does Not Automatically Attach To A Motion for Judgment Notwithstanding the Verdict

GE does not acknowledge the bottom line law that:

> If, on the other hand, the order made was without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court.

See, *Phillips v. Negley*, 117 U.S. 665, 671-72 (1886).[2]

GE, now[3] argues that Carlson incorrectly reasons that the district court ruled under Rule 59(d). (Br. Opp. 5 n. 3). GE bootstraps a position by citing the *Schudel* Court's unsupported conclusion that the new trial order was under Rule 50(b). The record is unsupported because GE failed to request a new trial under Rule 50(b). (A-101, 102)

Implicitly, GE's new position is that all J.N.O.V. motions include a motion for a new trial. If this was true, then the Rule 50(b) language – "[a] motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative" – is surplusage. (A-66, 67) If a new trial motion is automatically attached to a J.N.O.V. motion, then why have the above language in Rule 50(b)? See *Jackson*, 243 F.2d at 216.

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[2] This exception has been consistently endorsed. See, *Eaton v. Nat'l Steel Prod. Co.*, 624 F.2d 863 (9th Cir. 1980); *Peterman v. Chicago, Rock Island & Pacific RR Co.*, 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974); *Stradley v. Cortez*, 518 F.2d 488 (3rd Cir. 1975); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957); *Chicago & North Western Railway Co. v. Britten*, 301 F.2d 400 (8th Cir. 1962).

[3] GE argued Rule 50(c) to the *Schudel* Court. It was unfair to claim Carlson has asserted Rule 50(c), when he did not. *Schudel* incorrectly attributed a Rule 50(c) analysis to Carlson.

GE's argument is necessary because the Rule 59(b) motion was denied. (A-43) The order is silent on which rule granted the new trial. Pushing that a new trial motion is automatic with a J.N.O.V., GE ignores that otherwise there is only one legally plausible conclusion. That is, the court *sua sponte* moved for and granted a new trial on its own initiative.

Under Rule 50(b) the district court has no authority to initiate its own motion for a new trial. In contrast, under Rule 59(d), the district court had provisional authority to move and grant a new trial for a reason that it might have granted a new trial for a party. However, in light of the Rule 49(a) verdict, this district court lacked authority to grant a new trial on waived issues. Foremost, the district court only had ten days to move. The district court waited 134 days post-trial to move. In every respect, the district court lacked jurisdiction to grant a new trial under either Rule 50(b) or 59(d).

When Carlson challenged the authority to grant a new trial, the district court acknowledged the right of an immediate appeal. (A-48; A-108 to 111; A-114, 115). Opposing *certiorari* jurisdiction, GE travels down an irrelevant appellate road and illogically relies on *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), to thwart review.

A jury decided GE acted wrongfully. Nine years ago, Carlson was repeatedly exposed to 5 to 10 times the permissible exposure limits to a score of chemicals. The jury and the district court agreed Carlson proved neurological damage. The neurological injury means Carlson cannot live independently. He cannot work. He needs daily care and medical care. The trial lasted three months. He spent hundreds of thousands of dollars to prove his case. The jury verdict was three and one half years ago. If no one will hear Carlson's challenge, justice will be three years and thousands of dollars later. Carlson's due process has been ignored. GE fails to provide any reason

why this jurisdiction challenge should continue to be ignored.

Carlson's problem is not unique. If Rule 49(a) can be overuled by a district court disagreeing wiht expert "conclusions" under *Daubert*, new trial orders will run amoke.

B. The *Erie* Doctrine Has Not Been Addressed In Reference To *Daubert*, 509 U.S. 579

Avoiding the *Erie* Doctrine implications as to Rules 49(a), 50(b) and 59(d), GE's new approach[4] begins by stating Carlson "mocks the purpose of the *Daubert* inquiry." (Br. Opp. at 11) GE's new tactic spotlights the need for review. For long ago, it was observed that "[m]any errors, of a truth, consist merely in the application of the wrong names of things."[5]

Redefining the matter, GE tries to steer this Court away from deciding whether *Daubert*, 509 U.S. 579 is a rule of admissibility, sufficiency or both. Despite GE's depictions, Carlson asserts that *after* the opinion is admitted under *Daubert*, the courts in using Rules 49(a), 50 and 59(d) must apply state substantive law to test sufficiency.

GE states "Congress has mandated that such Rule [702] be followed." (Br. Opp. at 10) Standing alone GE's statement ignores the overriding Congressional mandate that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 20 U.S.C. § 2072(b). Practically, GE's position enlarges a chemical defendant's power

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[4] It is noteworthy that GE's pre-Opposition Brief position on "how" *Daubert* is to be used in *Schudel v. General Elec. Co.* was measurably different than the GE's position in *Joiner v. General Elec. Co.*, ___ U.S. ___, 118 S.Ct. 512 (1997). Carlson questions whether GE is now taking a third position as to *Daubert*'s application.

[5] *Ethics*, II, 47, Baruch Spinoza (1677).

while abridging the rights of persons poisoned by chemicals. Questions presented call for defining how admissibility under the federal rules can be harmonized with state substantive law controlling the sufficiency of proof. GE's oversimplistic view advocates that judicial decisions are rote rather than a considered analysis. GE disavows the principles flowing from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), including:

> [T]he message of [*Guaranty Trust Co., v.*] *York* [326 U.S. 99] itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.

See *Hanna v. Plummer*, 380 U.S. 460, 467 (1964). GE's tact is unwise and unworkable in diversity actions.

It is true this Court observed in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) that the Federal Rules of Evidence, being procedural, the *Erie* Doctrine need not be addressed when considering Fed. R. Evid. Rule 702. 509 U.S. at 589 n.6. Passing Carlson's issues off as minor, GE defines the matter as "highly fact-bound." The problems for litigants are that: (1) some federal courts are considering state substantive law in considering "relevancy" for purposes of admissibility; and (2) some federal courts are using state substantive law to determine admissibility; and (3) other courts are using *Daubert* to test sufficiency of causation proof. GE skirts the need to have predictable and stable diversity jurisdiction.

Counter to GE's notation, the *Schudel* Court raised no new issues is GE's reference to *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986). Pre-*Daubert*, the *Scott* Court repeatedly considered state substantive law in resolving the question of admissibility under Rule 702. *See* 789 F.2d at 1054 and 1055-56. In referencing *Scott*, is GE conceding or disputing that after *Daubert* the courts

consider substantive law in determining the relevancy of proffered expert opinions for purposes of admission?

GE's monologue is that *Stutzman v. CRST, Inc.*, 997 F.2d 291, 296 (7th Cir. 1993) disposes of Carlson's issues. *Stutzman* never mentions, much less discusses, *Daubert*'s implication to *Erie* Doctrine consideration. The *Stutzman* analysis does not rationalize the *Schudel* Courts use of *Daubert* to test the sufficiency. *Stutzman* specifically reasoned "the Federal Rules do not contain any threshold level of certainty requirement." *Stutzman* distinguished between tests for admissibility and sufficiency. *Schudel* as have other Ninth Circuit panels,[6] made no such distinction. The Seventh Circuit recognized "[u]nder the Federal Rules, certainty is an issue for the jury and does not affect admissibility. 997 F.2d at 296. In contrast, what *Schudel* and *Daubert*, 43 F.3d at 1320 believe encompasses "admissibility", is in direct conflict with the Seventh Circuit.[7]

The Seventh Circuit distinguishes between testing admissibility and sufficiency. *Stuzman* and the Ninth Circuit classify the task of admissibility as procedural; therefore, federal law applies. At this point, the circuits diverge. *Stutzman*, 997 F.2d at 296 holds:

> "Rule 702 does **not** require 'that an expert's opinion testimony be expressed in terms of a reasonable scientific certainty in order to be admissible . . . " (Emphasis Added.)

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[6] For example, *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995) views admissibility in terms of substantive state law. Another panel distinguished between a *Daubert* admissibility challenge and a challenge to the sufficiency of proof. *Marbled Murrelet v. Babbit*, 83 F.3d 1060 (9th Cir. 1996).

[7] It is erroneous for GE to hint that Carlson's causation proof was inadequate. The district court held proof of Carlson's neurological injury was sufficient. (A-31, 32).

Contrarily, some Ninth Circuit panels have set a variety of "creditability", i.e., sufficiency, test in the context of a *Daubert* challenge. Some panels hold admissibility involves the court weighing whether an opinion meets state substantive law requirements. 43 F.3d at 1320. Another panel held admissibility involves whether the opinion was developed independent of litigation. *Lust v. Merrell Dow Pharms., Inc.*, 89 F.2d 594, 597 (9th Cir. 1989). These divergent views of admissibility conflict with *Stutzman*, other Ninth Circuit panels and other circuits.[8]

Given GE's present position on how *Daubert* is applied, its citation to *Dawsey v. Olin Corp.*, 782 F.2d 1254 (5th Cir. 1986) is curious.[9] After a special verdict, *Dawsey* recognized that "the jury and not trial court was charged with determining whether any damages occurred . . . " *Dawsey*, 1260. Unlike the *Dawsey's* analysis, GE, as do some of the Ninth Circuit panels *inter alia Schudel*, switches between the tasks of testing for admissibility and sufficiency without comment. Carlson submits the random appellate switching accounts for the confusion and lack of outcome predictability in district courts.

C. GE's Circular Argument Does Not Address The Conflict Over *Daubert*, 509 U.S. 579 Application

On appeal GE lumps the plaintiffs together.[10] For an obvious reason in opposing any *certiorari* jurisdiction, GE

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[8] *Hopkins v. Dow Corning Corp.*, 33 F.3d 116 (9th Cir. 1994) and *Ambroosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996).

[9] Perhaps GE cites *Dawsey* to generate the impression of inadequate proof. On the contrary, Carlson had early, consistent on-going, objective, independent and verifiable proof he was poisoned and injured.

[10] Pre-appeal plaintiffs were treated as separately represented. Then, in a monumental blunder, GE failed to timely serve all plaintiffs but Carlson with the post-trial

attempts to circumvent review by sideswiping Carlson's issues. GE's new circular *Daubert* argument is that challenges to the sufficiency of proof are subsumed by an "admissibility analysis" under *Daubert*. The circular argument facilitates GE's ability to avoid the questions presented in reference to Rules 49(a), 50 and 59(d).

First, GE lines up its cross examination as if it was the only proof. (Br. Opp. at 4-5). GE seeks to make the matter so "highly fact bound" that *certiorari* jurisdiction will not be granted. (Br. Opp. 4-5, 11). Discouraging review, GE alludes that Carlson's proof lacked quality. *Id.* On this record nothing could be further from the truth.[11]

GE buffaloed the *Schudel* Courts into ignoring three months of "quality" evidence, including that: (1) organic solvents are "classic CNS depressants" (A-202); (2) the "neurological symptoms experienced by these workers are consistent with those associated with organic solvents" (A-188, A-217, 218);[12] (3) "[m]ost reports of solvent-related encephalopathy describe . . . very high short-term exposure with loss of consciousness" (A-188); (4) the

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motions. Marcia M. Meade has always ONLY represented Carlson. The blunder resulted in GE persistently blurring Carlson's case with the other nine plaintiffs to maintain a fiction that Ms. Meade accepted service for all plaintiffs.

[11] Despite GE's representation, a pre-trial *Daubert* hearing occurred. Carlson did produce pre-trial proffers on the scientific basis and methodology of the expert witnesses. Carlson's proof addressed GE's distorted position that there were only five known neurotoxic organic solvents, e.g., A-183 to 192, A-195 to 198, 200 to 204; A-224, 226 to 231.

[12] In arguing only five known neurotoxic organic solvents exist, GE leaves out the scientific fact that organic solvents injure by two different mechanisms by: (1) direct action on the nervous cell and, (2) causing cerebral hypoxia from loss of consciousness. GE's scientific shell game illustrates why the test of admissibility *MUST* be directed away from conclusions.

respiratory symptoms resulted from either the organic solvents, sodium hydroxide or the combination of respiratory irritants (A-189, A-232); and, (5) unprotected exposure was to a score of federally regulated hazardous chemicals for times and levels beyond those permitted.[13]

Second, GE writes off the *Erie* Doctrine questions tied to Rules 49(a), 50 and 59(d) by observing *Daubert* was a diversity case, where California had a different admissibility standard. (Br. Opp. 10) Third, GE insinuates Carlson's proof lacked "probable" medical testimony. Carlson did have the requisite competent medical proof. GE glosses over that pre-trial, in-trial, and post-trial the district court found Carlson's experts did meet the most stringent *Daubert* testing. Fourth, GE minimizes the conflicts over *Daubert*'s application as merely different fact patterns. Fifth, GE argues *Daubert* narrows the potential expert testimony. Sixth, GE returns to its belief that its cross-examination was the beginning and end of any *Daubert* analysis. Then in a leap from the *Daubert* "gatekeeper" role to testing sufficiency, GE takes the seventh and final step. This circular argument underscores

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[13] Carlson has identified the hazardous chemicals. See p. 5 footnote 3. GE suggest the injury of Carlson is tenuous. If one thinks about why and how the federal government regulates exposure to these chemicals, it is disingenuous that GE's attempt to disenfranchise the legal questions by hinting injury is problematic. Consider for example the regulation of two of the scores of chemicals at the clean-up. Exposure to perchoroethtylene (PERC), which is also called Tetrachloroethylene, is limited in any eight hour work period to 5 minutes in any 3 hour period of not more than 300 parts per million. 29 C.F.R. § 1910.1000 Table Z-2. Sodium hydroxide limits are 2 mg per cubic meter of air. § 1910.1000 Table Z-1. Like the PERC and Sodium Hydroxide, the score of hazardous chemicals exposure limits are listed under § 1910.1000.

why this Court must define "what" *Daubert* is testing and "how" the *Erie* Doctrine may apply.

The absurd results of GE's circular argument are not unique to Carlson if *Daubert* is both a test for admissibility and sufficiency. Under GE's theory, a party will never know whether a consistent Rule 49(a) verdict will be upheld. Uncertainty will exist despite a finding that an expert's methodology and scientific principles meet *Daubert's* requirements for admissibility. In a nutshell, GE's circular argument allows post-trial judicial second guessing under a *Daubert* sufficiency test. Carlson does not believe that is what this Court intended to be done with *Daubert v. Merrell Dow,* 509 U.S. 579.

III. CONCLUSION

It is obvious GE does not want this Court to review this case. Carlson believes it is because this record demonstrates how out of control litigation can become, when the courts are confused and in conflict over *Daubert v. Merrell Dow,* 509 U.S. 579 (1993). The purpose of Federal Rule of Civil Procedure 1 will be better served for the greatest number of litigants, if this Court addresses the matters now.

Respectfully submitted this 9th day of April 1998.

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